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12 UNITED STATES DISTRICT COURT
13 CENTRAL DISTRICT OF CALIFORNIA

14
15 HERBERT LESLIE GREENBERG,

16 Plaintiff,

17 v.

18
19 UNITED STATES SECURITIES
20 AND EXCHANGE COMMISSION,

21 Defendant.

Civil Action No.
CV 06-7878-GHK (CTx)

**DEFENDANT UNITED STATES
SECURITIES AND EXCHANGE
COMMISSION'S MEMORANDUM
OF POINTS AND AUTHORITIES
IN SUPPORT OF MOTION
TO DISMISS PLAINTIFF'S
FACA CLAIM**

Date: November 19, 2007
Time: 9:30 a.m.
Judge: Hon. George H. King

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1 **INTRODUCTION**

2 This Court previously dismissed plaintiff's claim that the United States
3 Securities and Exchange Commission ("SEC") has violated the Federal Advisory
4 Committee Act ("FACA") through its interactions with the Securities Industry
5 Conference on Arbitration ("SICA") as legally meritless, but granted leave to
6 amend. May 4, 2007 Order ("Order") at 4. With little – if any – new factual
7 allegations, plaintiff has restated this FACA claim. *See* Amended Complaint
8 ("Amended Compl.") ¶¶5-18, 48-50.¹ For the reasons set forth below, his FACA
9 claim remains lacking in merit, and this Court should again dismiss it pursuant to
10 Federal Rule of Civil Procedure ("Rule") 12(b)(6) with prejudice.

11 **BACKGROUND**

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14 **I. Procedural History**

15 Plaintiff filed suit on December 12, 2006. On February 14, 2007, the SEC
16 moved to dismiss plaintiff's FACA claim (among other claims), arguing that the
17 SEC has neither "established" nor "utilized" SICA, as those terms are applied in
18 the FACA context. *See* SEC Mem. in Support of Motion to Dismiss at 6-12 (Feb.
19 14, 2007) ("SEC Mem."). In response, plaintiff argued that SICA is a federal
20 advisory committee because it was created by the National Association of
21 Securities Dealers, Inc. ("NASD")² and other self-regulatory organizations

22
23
24 ¹ The Amended Complaint also claims that the SEC (1) has unreasonably delayed
25 in acting upon a petition for rulemaking that plaintiff has filed with the SEC, and
26 (2) improperly withheld certain 60 pages of documents sought by a Freedom of
27 Information Act request filed by plaintiff. *See id.* ¶¶19-47, 51-52. The SEC is
28 answering the allegations in those claims separately, and they are not covered by
this motion to dismiss.

²On July 26, 2007, the SEC approved a proposed rule change filed by NASD to
amend NASD's Certificate of Incorporation to reflect its name change to Financial

1 (“SROs”) which, he argued, are “quasi-public” entities. *See* Opp. to Defendant’s
2 Motion to Dismiss at 8-11 (March 13, 2007) (“Greenberg Opp.”). In support of
3 this argument, plaintiff asked the Court to take judicial notice of several public
4 statements to the effect that certain SEC and other officials had, occasionally, but in
5 non-FACA contexts, referred to NASD or other SROs as “quasi-public” entities.
6 *See* Request for Judicial Notice in Opposition to Defendant’s Motion to Dismiss
7 (March 13, 2007) (“Judicial Notice”); Order at 3.

8 On May 4, 2007, this Court granted the SEC’s motion to dismiss plaintiff’s
9 claim under FACA. This Court noted that plaintiff’s “sole argument” was that the
10 SEC “utilized” SICA – as that term has been applied in FACA cases – because
11 SICA was created by the SROs, which plaintiff characterized as “quasi-public”
12 entities. Order at 2. The Court stressed, however, that

13 the issue of whether the SROs are “purely private” vs. “quasi-public”
14 [for FACA purposes] turns on: (1) whether the SROs were formed by
15 the government; (2) whether they are funded by the government; and
16 (3) whether they were formed for the explicit purpose of furnishing
17 advice to the government.

18 *Id.* at 4.

19 The Court then found that plaintiff’s complaint “does not state any of the
20 facts essential to a determination of whether the SROs are quasi-public bodies
21 capable of establishing ‘utilized’ advisory committees for an agency[.]” Thus, it

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23 Industry Regulatory Authority Inc., or FINRA, in connection with the
24 consolidation of the member firm regulatory functions of NASD and NYSE
25 Regulation, Inc. *See* Self-Regulatory Organizations; National Association of
26 Securities Dealers, Inc.; Notice of Filing and Order Granting Accelerated
27 Approval of Proposed Rule Change Relating to the Restated Certificate of
28 Incorporation of National Association of Securities Dealers, Inc., 72 F.R. 42190
(Aug. 1, 2007). Because the documents in this matter refer to NASD and NYSE,
we continue to use these terms.

1 held that plaintiff did “not sufficiently allege that the SROs [self-regulatory
2 organizations] are ‘quasi-public’ for SICA to constitute a ‘utilized’ committee that
3 is subject to FACA.” *See id.* The Court gave plaintiff leave to amend. *Id.* at 4-5.
4

5 **II. Factual Allegations.**

6 As plaintiff’s FACA claim concerns SICA, we briefly revisit that entity’s
7 origin and functions. In addition, as that claim focuses on whether the SROs are
8 “quasi-public” for FACA purposes, we briefly summarize plaintiff’s limited “new”
9 allegations concerning the relationship between the SEC and the SROs.
10

11 **A. Securities Industry Conference on Arbitration.**

12 As the SEC has previously noted, the SROs established SICA in early 1977,
13 tasking it with developing a proposal for a uniform, efficient, economical and
14 appropriate mechanism for resolving investor complaints against brokerage firms.
15 SICA prepared and adopted a uniform code of arbitration covering all disputes
16 between customers and broker-dealers. Thereafter, SROs, including the New York
17 Stock Exchange (“NYSE”) and the NASD separately filed with the SEC their own
18 proposals to implement arbitration rules based on SICA’s uniform code. The SEC
19 ultimately approved those proposals in accordance with the procedures in Section
20 19 of the Securities Exchange Act of 1934 (“Exchange Act”), 15 U.S.C. 78s, and
21 Rule 19b-4, 17 C.F.R. 240.19b-4. *See, e.g., In the Matter of New York Stock*
22 *Exchange, Inc.*, SEC Release No. 34-16390, 1979 WL 173293, *1 & n.5 (Nov. 30,
23 1979) (approving NYSE adoption of arbitration code based on SICA model rules,
24 and noting eight other SROs that had adopted SICA’s arbitration procedures for
25 small claims).

26 SICA’s members are representatives from SROs, the Securities Industry
27 Association and Financial Markets Association (formerly known as the Securities
28 Industry Association) and, currently, three members of the public. In addition,

1 members of the staffs of the SEC, the Commodity Futures Trading Commission,
2 the American Arbitration Association, along with members of the North American
3 Securities Administrators Association and the former public members of SICA, are
4 invited to attend SICA's meetings. Candidates with extensive experience in
5 alternative dispute resolution have been selected to serve as public members of
6 SICA following interviews by the current and former public members, subject to
7 the concurrence of the SRO participants of SICA.³

8 SROs may look to SICA's model rules of arbitration in deciding how they
9 might propose revising their own arbitration rules. The SEC must approve any
10 changes to an SRO's arbitration rules, however, following public notice and
11 comment. *See* 15 U.S.C. 78s(b).⁴

12
13 **B. Allegations in Plaintiff's Amended Complaint.**

14 Contrary to the Court's instruction that plaintiff present new factual
15 allegations in amending his FACA claim, Order at 4-5, plaintiff's amended FACA
16 claim largely rehashes his original allegations and arguments. As set forth in
17 greater detail in the chart attached as Exhibit 1 to this memorandum, his amended
18 complaint is essentially a mixture of the allegations in his original complaint⁵ or his

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20 ³ As noted previously, since this information derives from documents expressly
21 referenced in plaintiff's Amended Complaint, the SEC's citation to these
22 documents does not convert this motion from a Rule 12(b) motion to dismiss into
23 a Rule 56 motion for summary judgment. *See* SEC Mem. at 4 n.3.

24 ⁴ *See, e.g.,* Self-Regulatory Organizations; New York Stock Exchange, Inc.; Order
25 Approving Proposed Rule Change and Amendments No. 1 and 2 Thereto
26 Regarding NYSE Rule 619 To Clarify That Failure To Appear or Produce
27 Documents in Arbitration May Be Deemed Conduct Inconsistent With Just and
Equitable Principles of Trade, 71 Fed. Reg. 48961-01 (Aug. 22, 2006).

28 ⁵ *Compare, e.g.,* Amended Compl. ¶6 with Compl. ¶5.

1 request for judicial notice⁶ with arguments made in his original opposition⁷ or non-
2 factual citations to caselaw⁸ or to legislative history.⁹

3 Tellingly absent, however, is the addition of the necessary facts that the
4 Court stressed were lacking from plaintiff's original complaint. The only "new"
5 "facts" that plaintiffs alleges in his amended FACA claims are his conclusory
6 allegations – nearly all of which appear to relate to his claim that the SROs are
7 "quasi-public" for FACA purposes – that:

- 8 ● the SEC approved the SROs' registration as SROs, "sometimes"
9 consults with them, and "sometimes requests or encourages
10 them" to establish advisory committees, such as SICA, whose
11 meetings SEC representatives attend (Amended Compl.
12 ¶13(A)(1)-(3));
- 13 ● Congress created a system where the SROs, unsurprisingly, self-
14 regulate, with SEC oversight (*id.* ¶13(A)(4));
- 15 ● SROs are obligated to enforce their members' compliance with
16 securities laws and SRO rules, propose SRO rule changes that
17 are subject to SEC approval or modification (including
18 arbitration rules), and allegedly "stand in the shoes of the SEC"
19 in delisting companies for trading (*id.* ¶13(A)(5)-(8),(11));
- 20 ● SROs sponsor conferences to gather information on resolving
21 securities disputes, and report to the SEC on these matters (*id.*

23 ⁶ Compare, e.g., Amended Compl. ¶13(C)(3) with Judicial Notice, Ex. B.

24 ⁷ Compare, e.g., Amended Compl. ¶13(A)(9) with Greenberg Opp. at 9, lines 9-11.

26 ⁸ See, e.g., Amended Compl. ¶12 (quoting *Animal Legal Def. Fund v. Shalala*, 104
27 F.3d 424-30 (D.C. Cir. 1997)).

28 ⁹ See, e.g., Amended Compl. ¶10 (quoting FACA legislative history).

1 ¶13(A)(9)); and

- 2 ● in the past 15 years, one official at the Boston Stock Exchange and
3 one at the NYSE each referred to SROs as “quasi-public” (*id.*
4 ¶13(D)(2),(4)).¹⁰

5 However, none of these “new” allegations remedies the deficiencies
6 previously identified by the Court, namely the lack of factual allegations showing
7 that the SROs were (1) formed by the government, (2) funded by the government,
8 or (3) were formed for the explicit purpose of furnishing advice to the government.

9 10 ARGUMENT

11 Plaintiff’s amended FACA claim should be dismissed pursuant to Rule
12 12(b)(6). Under the relevant provision of the FACA, an entity is a federal advisory
13 committee if it is “established or utilized” by a federal agency. 5 U.S.C. App. 3(C).
14 As with his original complaint, plaintiff in his Amended Complaint appears to
15 focus on his contention that the SEC utilizes SICA through SROs that are “quasi-
16 public” arms of the SEC for FACA purposes – indeed, his “new” allegations focus
17 nearly exclusively upon the relationship between the SROs and the SEC. But just
18 as with the original complaint, plaintiff’s Amended Complaint utterly fails to “state
19 any of the facts essential” to find that SROs were created or funded by the SEC, or
20 formed for the express purpose of furnishing advice to the SEC, which the Court
21 rightly noted is the relevant test under the governing caselaw for determining if an
22 entity is “quasi-public” for FACA purposes.

23 Nor do plaintiff’s allegations about SICA’s relationship with the SEC –
24 allegations which remain virtually unchanged since his original complaint –

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27 ¹⁰ Plaintiff also alleges that an SEC employee remarked at a SICA meeting that
28 *Id.* ¶16(B).
SICA “has served as a good sounding board for ideas and to work out problems.”

1 demonstrate that the SEC established SICA, or that SICA is subject to the strict
2 management and control of the SEC, either directly or through the SROs, as would
3 be required to find that the SEC “utilizes” SICA for FACA purposes. For these
4 reasons, plaintiff’s amended FACA claim is legally meritless and should be
5 dismissed.

6

7 **I. The SROs Are Not Quasi-Public for Purposes of FACA.**

8 Plaintiff cannot demonstrate that any SRO utilization of SICA can be
9 imputed to the SEC because, as he asserts, the SROs are purportedly “quasi-public”
10 entities. Amended Compl. ¶13. This Court has held that “the issue of whether the
11 SROs are ‘purely private’ vs. ‘quasi-public’ [for purposes of FACA] turns on: (1)
12 whether the SROs were formed by the government; (2) whether they are funded by
13 the government; and (3) whether they were formed for the explicit purpose of
14 furnishing advice to the Government.” Order at 4. This ruling accords squarely
15 with the Supreme Court and appellate court precedent that formulated and
16 addressed what constitutes a “quasi-public” entity for FACA purposes. *See Public*
17 *Citizen v. United States Dep’t of Justice*, 491 U.S. 440, 462 (1989) (for entity to be
18 quasi-public, it must be “created or permeated by the federal government”); *Animal*
19 *Legal Def. Fund*, 104 F.3d at 429 (“what mattered to the [Supreme Court in *Public*
20 *Citizen*] was who formed and funded [the organization], and whether it was formed
21 ‘for the explicit purpose of furnishing advice to the Government’”).

22 Plaintiff’s Amended Complaint nowhere alleges facts demonstrating that the
23 SEC formed or funded the SROs, or that they were organized for the express
24 purpose of advising the SEC.¹¹ As the Court noted in its Order, plaintiff in his

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27 ¹¹ As the SEC has noted previously, it is clear that the NASD and other SROs are
28 privately funded, were not created by the SEC, and are independent businesses
(some of which have issued publicly traded stock) that were created for business

1 original complaint failed to state facts sufficient to find the SROs “quasi-public”
2 for FACA purposes. Order at 4. Nor do any of plaintiff’s “new” “facts,” see pages
3 5-6, above, meet any of the aforementioned three criteria. Indeed, these new facts
4 often do little more than restate previous allegations. First, his allegations that the
5 SEC regulates the SROs (including communicating from time-to-time with the
6 SROs or organizations formed by the SROs), that the SROs have duties to enforce
7 securities laws, and that the SEC approves SRO rules, *see id.*, echo allegations that
8 the Court previously found inadequate to establish that the SROs are “quasi-
9 public” for FACA purposes. *See* Order at 4 (quoting Compl. ¶4) (finding
10 insufficient plaintiff’s allegations that the SROs are “amenable/subject to strict
11 management by the SEC through [its] exercise of regulatory authority, closely tied
12 to policies of [the] SEC and obligated to enforce securities laws”)¹². Next,
13 plaintiff’s allegation that the SEC formed the SROs because it approves their
14 registrations as SROs is simply absurd. Government approval of a private entity’s
15 registration is a far, far cry from the government affirmatively “forming” that
16 entity. And neither the foregoing allegations, nor plaintiff’s citation of additional
17 instances where some person once called an SRO “quasi-public,” remotely
18 demonstrate that the SEC funds the SROs, or that the SROs were *formed* for the
19 *explicit purpose* of advising the SEC. Simply put, the Amended Complaint offers

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21 reasons, not to advise the SEC. *See* SEC Reply Br. at 5-6.

22 ¹² As the SEC has noted previously, plaintiff’s attempt to contort an agency
23 oversight of an entity into a finding that the agency formed that entity is untenable.
24 The SEC also closely oversees broker-dealers, *see* 15 U.S.C. 78a *et seq.*, and
25 investment companies and investment advisors. *See* 15 U.S.C. 80a-1 *et seq.*; 15
26 U.S.C. 80b-1 *et seq.* Also, the FDIC closely oversees banks, and the FAA closely
27 regulates airlines. It is absurd – and contrary to law – to suggest that an entity
28 becomes “quasi-public” under the FACA merely because an agency regulates it.
See generally SEC Reply Br. at 6.

1 nothing to fix the deficiencies that the Court identified in plaintiff's first attempt to
2 show that the SROs are quasi-public in the FACA context.

3 **II. The SEC Does Not Exercise Strict Management and Control over SICA**
4 **as to "Utilize" It for FACA Purposes.**

5 Nor can plaintiff argue that the SEC directly "utilizes" SICA, as that term is
6 applied under the FACA. As the SEC has noted previously, the Supreme Court has
7 held that an agency "utilizes" an entity under the FACA only where that entity is
8 funded by or otherwise "amenable to the strict management [of] agency officials."
9 *Public Citizen*, 491 U.S. at 457-58; *see also Alcoa v. National Marine Fisheries*
10 *Serv.*, 92 F.3d 902, 905 (9th Cir. 1996) (entity is only utilized under the FACA
11 where it is "so closely tied to [the Agency] as to be amenable to strict
12 management"). Even if an agency affirmatively solicits the views of the entity or
13 relies upon its recommendations, that is not enough for the agency to be deemed to
14 "utilize" the entity for FACA purposes. *Id.*; *see generally* SEC Mem. at 8-12.¹³

15 By these standards, plaintiff utterly fails to allege that the SEC has "utilized"
16 SICA directly. First, as the Court noted previously, Order at 3, plaintiff's defense
17 of his original complaint appeared to abandon this argument, focusing on the
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19 ¹³ *See also Washington Legal Found. v. United States Sentencing Comm'n*, 17
20 F.3d 1446, 1450 (D.C. Cir. 1994) (*Public Citizen* imposes a "stringent standard,
21 denoting something along the lines of actual management or control"); *Byrd v.*
22 *EPA*, 174 F.3d 239, 247-48 (D.C. Cir. 1999) (peer review panel convened by
23 contractor to assess EPA's update of benzene report was not "utilized" by EPA,
24 even though EPA provided list of potential panel members, had final authority
25 over the panel's composition and reserved the power to make comments on the
26 panel's report); *Judicial Watch, Inc. v. Dep't of Commerce*, 2007 WL 2362980, *4
27 (D.D.C. Aug. 16, 2007) (dismissing claim that agency "utilized" committee merely
28 "by receiving and relying on its policy advice and recommendations," as there was
no suggestion that agency exercised "actual management or control" over the
committee).

1 argument that SICA was allegedly created by “quasi-public” SROs, and this Court
2 (by initially dismissing plaintiff’s FACA claim in its entirety, albeit with leave to
3 amend) implicitly held that plaintiff had failed to show that the SEC has utilized
4 SICA. Moreover, any reconsideration of plaintiff’s allegations in this regard only
5 reinforces that conclusion. Plaintiff alleges that “for approximately thirty (30)
6 years the SEC has employed SICA to obtain . . . advice and recommendations [on
7 matters related to rules governing arbitration before forums sponsored by SROs].”
8 Amended Compl. ¶7. But even assuming *arguendo* the accuracy of this allegation,
9 it merely shows that the SEC has consulted with SICA. It certainly fails to show
10 that SICA receives any public funding, or that SICA is subject to the SEC’s strict
11 management and control. Indeed, plaintiff admits precisely the opposite, alleging
12 that the SEC “has *not* . . . [e]xercised control and supervision over procedures and
13 accomplishments of SICA.” *Id.* ¶18(F)(1) (emphasis added).

14 As for his allegations that SEC staff are invited to and attend SICA meetings,
15 *id.* ¶13(A)(3), what is relevant is that plaintiff does not – and cannot – allege that
16 SEC staff schedules, sets the agenda for, or runs these meetings. Finally, his lone
17 new allegation concerning the SEC’s relationship with SICA – that an SEC staffer
18 once described SICA as “a good sounding board for ideas and to work out
19 problems,” *id.* ¶16(B) – comes nowhere close to demonstrating the SEC’s strict
20 management or control SICA. Plaintiff’s own allegations thus squarely refute any
21 claim that the SEC utilizes SICA as an “advisory committee” within the meaning of
22 FACA.

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1 **CONCLUSION**

2 For the foregoing reasons, the Court should grant the SEC's motion to
3 dismiss plaintiff's FACA claim with prejudice.

4 Respectfully submitted,

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16 Counsel for the Securities and
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DATED: September 21, 2007

EXHIBIT 1

FACA ALLEGATIONS REPEATED IN AMENDED COMPLAINT

Paragraph in Amended Compl.	Record Cites to Original Source of Allegation
6(A)-(C)	Compl. ¶5(A)-(C)
7	Compl. ¶7
8	Opp. at 8 lines 8-15; Compl. ¶6
9	Opp. at 8 lines 8-15; Compl. ¶7
10	FACA Legislative History
11	<i>Public Citizen v. U.S. Dep't of Justice</i> , 491 U.S. 440 (1989); Opp. at 12 line 8.
12	<i>Animal Legal Defense Fund v. Shalala</i> , 104 F.3d 424 (D.C. Cir. 1997); Opp. at 7 line 14.
13(A)	Opp. at 12 lines 20-21
13(A)(9)	Opp. at 10 lines 9-11
13(B)	Opp. at 8 line 25
13(B)(1)	Opp. at 8 line 27 - Opp. at 9 line 6
13(B)(2)	Opp. at 8 line 27
13(C)	Opp. at 9 line 10
13(C)(1)	Opp. at 9 line 7
13(C)(2)	Judicial Notice Ex. A
13(C)(3)	Judicial Notice Ex. B
13(D)(1)	Opp. at 9 line 13; Judicial Notice Ex. C
13(D)(3)	Opp. at 9 line 16; Judicial Notice Ex. D
14(A)-(D)	Compl. ¶8(A)-(D)
15(A)-(B)	Compl. ¶9(A)-(B)
16(A)	Compl. ¶10
17	Compl. ¶11
18(A)-(F)(3)	Compl. 12(A)-(F)(3)

1
2 **PROOF OF SERVICE**

3 I am over the age of 18 years and not a party to this action. My business address
4 is:

5 U.S. SECURITIES AND EXCHANGE COMMISSION, 100 F Street, N.E.,
6 Washington, D.C. 20549-9612

7 Telephone No. (202) 551-5163; Facsimile No. (202) 772-9263.

8 On September 21, 2007, I served true copies of documents entitled
9 (1) **DEFENDANT UNITED STATES SECURITIES AND EXCHANGE**
10 **COMMISSION'S NOTICE OF MOTION AND MOTION TO DISMISS**
11 **PLAINTIFF'S FACIA CLAIM, (2) DEFENDANT UNITED STATES**
12 **SECURITIES AND EXCHANGE COMMISSION'S MEMORANDUM OF**
13 **POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS,**
14 and (3) a **PROPOSED ORDER** upon the parties to this action addressed as stated
15 on the attached service list:

16 **OFFICE MAIL:** By placing in sealed envelope(s), which I place for
17 collection and mailing today following the ordinary business practices. I am
18 readily familiar with this agency's practice for collection and processing of
19 correspondence for mailing; such correspondence would be deposited with
20 the United States Postal Service on the same day in the ordinary course of
21 business.

22 **PERSONAL DEPOSIT IN MAIL:** By placing in sealed
23 envelope(s), which I personally deposited with the U.S. Postal
24 Service at Washington, D.C., with first class postage thereon fully
25 prepaid.

26 **EXPRESS U.S. MAIL:** Each such envelope was deposited in a
27 facility regularly maintained at the U.S. Postal Service for receipt of
28 Express Mail at Washington, D.C., with Express Mail postage paid.

HAND DELIVERY: I caused to be had delivered each such envelope to
the office of the addressee.

FEDERAL EXPRESS BY AGREEMENT OF ALL PARTIES: by
placing in sealed envelope(s) designated by Federal Express with delivery
fees paid or provided for, which I deposited in a facility regularly
maintained by Federal Express or delivered to a Federal Express courier, at
Washington, D.C.

ELECTRONIC MAIL: By transmitting the document by electronic mail to
the electronic mail address as stated on the attached service list.

FAX (BY AGREEMENT ONLY): By transmitting the document by
facsimile transmission. The transmission was reported complete and
without error.

1 [] (Federal) I declare that I am employed in the office of a member of the bar
2 of this Court, at whose direction the service was made. I declare under
penalty of perjury that the foregoing is true and correct.

3 Date: September 21, 2007


Kristin S. Mackert

4
5
6 **HERBERT LESLIE GREENBERG v. SEC**
7 **United States District Court - Central District of California**
8 **Case No. CV 06-7878 GHK (CTx)**

9 **SERVICE LIST**

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13 ***Plaintiff In Propria Persona***

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